# Poh Boon Construction Sdn Bhd v Aw Boon Hwa

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO (MT-1) 22–736 OF 2002
VERNON ONG JC
31 JULY 2009

*Contract — Joint venture — Joint venture agreement ('JVA') — Housing development — Land developed for residential purposes — Parties executed second supplementary agreement — Whether second supplementary agreement valid and binding — Whether plaintiff and/or defendant breached obligations under JVA and second supplementary agreement — Whether entitled to damages and other orders*

The defendant, the registered owner of a piece of land in Johor ('the land'), had, on 7 November 1994, entered into a joint venture agreement ('JVA') with the plaintiff to develop the land into a housing and/or industrial estate. Subsequent to the execution of the JVA, the plaintiff obtained the approval for the conversion and subdivision on 28 July 1997. The defendant had, at the request of the plaintiff for the purposes of obtaining a developer's licence, entered into the first supplementary agreement. The developer's licence was subsequently obtained on 4 August 1999. On 30 June 1999, the defendant agreed to transfer the land to the plaintiff by way of sale. In consideration of the sale, the plaintiff had to pay the purchase price which was the equivalent of the value of the housing units due to the defendant under the JVA. Accordingly, the purchase price was to be settled by way of allocation of the defendant's entitlement of the housing units under the JVA. Subsequently, on 1 August 2000 the defendant forwarded to the plaintiff the second supplementary agreement, the letter of guarantee (L/G) and the documents for the surrender and re-alienation of the land all duly executed by the defendant together with the original title deed to the land. However, despite numerous reminders, the plaintiff refused to furnish the defendant with a duly executed and stamped copy of the second supplementary agreement. The plaintiff had vide a letter dated 12 October 2000, proposed variations to the second supplementary agreement. The plaintiff proposed that the time frame for the completion of the project was to be two years from the date of approval or confirmation of the conversion and subdivision. The plaintiff's proposed variation contradicted the provision in the second supplementary agreement which provided for the period of commencement and completion within two years calculated from the date of delivery of the original title deed of the land and execution of all instruments and documents for the surrender

and re-alienation. The plaintiff's proposed variation was however, rejected by the defendant. Thereafter, the plaintiff proposed a series of new variations to the defendant but was rejected by the defendant who had insisted 1 August 2000 as the commencement date. The plaintiff herein asserted, inter alia, that the second supplementary agreement was never executed by the plaintiff. The plaintiff further contended that the defendant had breached his obligations under the JVA. Therefore, the plaintiff prayed for a declaration that the JVA was null and void, and for loss and damages. The defendant however, contended that the plaintiff breached their obligations under the JVA and counterclaimed for the return of the document of title to the land, the removal of a caveat lodged by the plaintiff over the land, and vacant possession of the land. The issues raised for determination by the court were whether the plaintiff and/or defendant had breached their obligations under the JVA and second supplementary agreement; and whether the plaintiff and/or the defendant were entitled to the damages and other orders as pleaded.

**Held**, dismissing the plaintiff's claim with costs; allowing the defendant's counterclaim in part:

(1) The plaintiff's solicitors had sent the second supplementary agreement to the defendant only after the plaintiff and the defendant had agreed on the terms and conditions therein. Acting on that premise the defendant executed the second supplementary agreement and other documents. It was only after a lapse of more than 19 months that on 22 March 2002 the plaintiff asserted for the first time that the second supplementary agreement was not valid as it was never executed by the plaintiff. In the aforesaid circumstances, the plaintiff could not draw back from the second supplementary agreement. The second supplementary agreement was clearly a concluded agreement. For the foregoing reasons, the second supplementary agreement was a valid and binding agreement (see para 21).

(2) The second supplementary agreement was not an agreement which was distinct and separate from the JVA. It was an agreement which was supplemental to the JVA and should be read together with the JVA. Accordingly, to the extent that any terms and conditions in the JVA are inconsistent with the second supplementary agreement, the terms and conditions of the second supplementary agreement shall prevail (see para 24).

(3) The evidence showed that the defendant was at all times ready, able and wiling to hand over the duly executed MOT to the plaintiff. It was the plaintiff who refused to hand over the second supplementary agreement and the L/G in exchange for the MOT and title deed. Therefore, the

plaintiff's allegation was unsubstantiated and without basis. In this respect the plaintiff's refusal to hand over the L/G to the defendant was in breach of the JVA and the second supplementary agreement (see para 26).

(4) Under the second supplementary agreement the period of two years was calculated from the date of the delivery of the title deed and execution of the documents for the surrender and re-alienation of the land which was 1 August 2000. Accordingly, the date for completion was 31 July 2002. Even though the plaintiff had already obtained the developer's licence on 4 August 1999, the plaintiff did not commence any work on the site; instead the plaintiff procrastinated. By 31 July 2002 there was still nothing built on the land. When the JVA had lapsed there was evidently no work done by the plaintiff on the land. In the circumstances, the plaintiff had failed to commence and complete the project in accordance with the JVA and second supplementary agreement. The plaintiff's aforesaid failure was a breach of the JVA and second supplementary agreement (see para 27).

**[Bahasa Malaysia summary**

Defendan, pemilik berdaftar sebidang tanah di Johor ('tanah tersebut'), pada 7 November 1994 telah menandatangani perjanjian usaha sama dengan plaintif untuk membangunkan tanah tersebut kepada kawasan perumahan dan/atau perindustrian. Selepas penyempurnaan perjanjian usaha sama tersebut, plaintif mendapat kelulusan untuk penukaran syarat tanah dan pecah bahagi pada 28 Julai 1997. Defendan, atas permintaan plaintif bagi tujuan mendapatkan lesen pemaju, telah menandatangani perjanjian tambahan pertama. Lesen pemaju kemudiannya diperoleh pada 4 Ogos 1999. Pada 30 Jun 1999, defendan bersetuju memindah milik tanah tersebut dengan cara menjualnya. Sebagai balasan penjualan tersebut, plaintif perlu membayar harga jualan yang bersamaan dengan harga unit-unit rumah yang harus dibina oleh defendan di bawah perjanjian usaha sama tersebut. Harga belian tersebut harus diselesaikan dengan cara memperuntukkan hak defendan atas unit-unit perumahan seperti dalam perjanjian usaha sama. Pada 1 Ogos 2000, defendan mengemukakan kepada plaintif perjanjian tambahan kedua, surat jaminan dan dokumen-dokumen untuk penyerahan dan pemindahan milikan tanah kesemuanya telah disempurnakan oleh defendan bersama dengan surat ikatan hak milik yang asal. Namun, setelah beberapa peringatan, plaintif enggan menyerahkan kepada defendan salinan perjanjian tambahan kedua yang telah disempurnakan dan disetem. Dalam surat bertarikh 12 Oktober 2000, plaintif telah mencadangkan beberapa perubahan bagi perjanjian tambahan kedua tersebut. Plaintif mencadangkan agar tempoh penyempurnaan projek tersebut adalah dalam masa dua tahun dari tarikh kelulusan atau pengesahan tukar syarat tanah tersebut dan pecah

bahagi. Cadangan perubahan plaintif bercanggah dengan perjanjian tambahan kedua yang menyatakan bahawa tempoh permulaan dan penyempurnaan dalam masa dua tahun dikira dari tarikh penyerahan surat ikatan hak milik asal tanah tersebut dan penyempurnaan kesemua instrumen dan dokumen bagi penyerahan dan pindah milikan semula. Cadangan perubahan plaintif, walau bagaimanapun, ditolak oleh defendan. Kemudiannya, plaintif mencadangkan beberapa perubahan baru kepada defendan tetapi ditolak dan dia menegaskan bahawa 1 Ogos 2000 merupakan tarikh permulaan. Plaintif menegaskan di sini, antara lain, bahawa perjanjian tambahan kedua tidak pernah disempurnakannya. Plaintif seterusnya menghujah bahawa defendan memungkiri tanggungjawabnya di bawah perjanjian usaha sama. Oleh itu, plaintif memohon suatu perisytiharan bahawa perjanjian usaha sama tersebut batal dan tak sah, dan juga kerugian. Defendan walau bagaimanapun, menghujah bahawa plaintif yang memungkiri tanggungjawabnya di bawah perjanjian usaha sama tersebut dan menuntut balas untuk pemulangan surat ikatan hak milik, pemotongan kaveat yang dimasukkan oleh plaintif atas tanah tersebut dan milikan kosong tanah tersebut. Isu-isu yang dibangkitkan untuk penentuan mahkamah ialah sama ada plaintif dan/atau defendan telah memungkiri tanggungjawab mereka di bawah perjanjian usaha sama dan perjanjian tambahan kedua; dan sama ada plaintif dan/atau defendan berhak ke atas ganti rugi dan perintah-perintah lain yang dipohon.

**Diputuskan**, menolak permohonan plaintif dengan kos; membenarkan sebahagian tuntutan balas defendan:

(1) Peguam cara plaintif telah menghantar perjanjian tambahan kedua kepada defendan hanya selepas plaintif dan defendan bersetuju atas terma-terma dan syarat-syaratnya. Atas landasan itu, defendan menyempurnakan perjanjian tambahan kedua dan dokumen-dokumen lain. Hanya selepas lebih 19 bulan iaitu pada 22 Mac 2002 plaintif menyatakan untuk pertama kalinya bahawa perjanjian tambahan kedua tersebut tidak sah kerana tidak pernah disempurnakan oleh plaintif. Dalam keadaan sebegitu, plaintif tidak boleh berundur daripada perjanjian tambahan kedua tersebut. Atas alasan-alasan yang dinyatakan, perjanjian tambahan kedua tersebut sah dan merupakan perjanjian yang mengikat (lihat perenggan 21).

(2) Perjanjian tambahan kedua bukanlah suatu perjanjian yang berlainan dan berasingan daripada perjanjian usaha sama tersebut. Perjanjian itu merupakan tambahan kepada perjanjian usaha sama tersebut dan harus dibaca bersama-sama. Maka, setakat apa-apa terma dan syarat dalam

perjanjian usaha sama yang konsisten dengan perjanjian tambahan kedua tersebut, terma dan syarat perjanjian tambahan kedua adalah mengatasi (lihat perenggan 24).

(3) Keterangan menunjukkan bahawa defendan, pada setiap masa, bersedia, boleh dan rela untuk menyerahkan memorandum pindah milik yang telah disempurnakan kepada plaintif. Plaintif yang tidak mahu menyerahkan perjanjian tambahan kedua dan surat jaminan sebagai balasan kepada memorandum pindah milik dan surat ikatan hak milik. Maka, dakwaan plaintif tidak berasas. Keengganan plaintif menyerahkan surat jaminan kepada defendan merupakan kemungkiran perjanjian usaha sama dan juga perjanjian tambahan kedua (lihat perenggan 26).

(4) Di bawah perjanjian tambahan kedua, tempoh masa dua tahun tersebut dikira dari tarikh penyerahan surat ikatan hak milik dan pelaksanaan dokumen-dokumen untuk penyerahan dan pindah milikan semula tanah tersebut iaitu pada 1 Ogos 2000. Oleh yang demikian, tarikh penyempurnaan ialah 31 Julai 2002. Walaupun plaintif telah mendapat lesen pemaju pada 4 Ogos 1999, plaintif tidak memulakan sebarang kerja di tapak pembinaan, malah ia berlengah-lengah. Apabila perjanjian usaha sama tersebut telah luput, tiada langsung kerja-kerja yang telah dilakukan oleh plaintif atas tanah tersebut. Dalam keadaan ini, plaintif gagal memula dan menyempurnakan projek tersebut mengikut perjanjian usaha sama dan perjanjian tambahan kedua. Kegagalan plaintif itu merupakan kemungkiran kepada perjanjian usaha sama dan perjanjian tambahan kedua (lihat perenggan 27).]

**Notes**

For cases on joint venture agreement, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4299–4300.

**Cases referred to**

*Ho Kam Phaw v Fan Sin Nin* [2000] 2 MLJ 529; [2000] 3 CLJ 1, FC (refd)

*KC Tho (KC Tho & Partners) for the plaintiff.*
*PK Nathan (Mala Nathan with him) (PK Nathan & Co) for the defendant.*

**Vernon Ong JC:**

**[1]** Aw Boon Hwa ('the defendant') is the registered owner of the land held under EMR 5199 Lot No 7839 Mukim Tanjung Sembrong, Daerah Batu Pahat, Johor ('the land'). By a joint venture agreement dated 7 November 1994 ('the JVA') entered into between the defendant and Poh Boon Construction Sdn Bhd, ('the plaintiff') the plaintiff agreed to develop the

land into a housing and/or industrial estate. The plaintiff contends that the defendant breached his obligations under the JVA and is claiming for (a) a declaration that the JVA is null and void, and (b) loss and damages. On the other hand the defendant contends that the plaintiff breached their obligations under the JVA and counterclaims for (a) the return of the document of title to the land, (b) the removal of a caveat lodged by the plaintiff over the land, and (c) vacant possession of the land.

THE FACTS AS PRESENTED BY THE EVIDENCE

**[2]** The JVA was prepared by Mr Lim Kian Ser ('DW2') of Messrs Chin Hin Lam & Co solicitors for the defendant. On 7 November 1994 the defendant executed the JVA and the power of attorney which was subsequently registered at the Johore Bahru High Court. On or about 10 December 1994 the defendant executed the memorandum of transfer ('MOT'). On 18 December 1994 the defendant deposited the title deed to the land with Messrs Chin Hin Lam & Co. The approval for the conversion and subdivision of the land was obtained on 28 July 1997. The plaintiff obtained a developer's licence on 4 August 1999 for the period from 2 August 1999 to 1 August 2002. The plaintiff renewed the developer's licence on 1 August 2000 for the period from 2 August 2000 to 1 August 2004. The plaintiff also obtained a sales and advertising permit on 2 September 1999. The sales and advertising permit was subsequently renewed on 22 June 2000, 9 July 2001, 2 August 2002 and 4 August 2003.

**[3]** Between March 1998 to April 2003 the plaintiff and the defendant exchange numerous correspondence. These correspondence form the main body of documentary evidence shedding light upon the conduct of the plaintiff and the defendant. On 2 March 1998 the plaintiff wrote to the Chin Hin Lam & Co informing that the approval for the conversion and subdivision had been obtained and asked for the transfer of the land pursuant to cl 4(d). Chin Hin Lam & Co replied on 5 March 1998 asking the plaintiff to arrange with the defendant to call at their office in order to prepare a supplementary agreement for the transfer of the land. On 6 October 1998 the plaintiff wrote to Chin Hin Lam & Co informing that they are planning to start the project and asking for the transfer documentation to be prepared. Meanwhile on 23 October 1998 the plaintiff also wrote to the defendant to select the subdivided lots as the layout plan has been approved. Messrs CL Boo & Associates ('the plaintiff's solicitors') then wrote to Chin Hin Lam & Co on 19 November 1998 requesting for the transfer documentation for the land and a copy of the letter of guarantee ('L/G') for the plaintiff's approval. On 10 December 1998 Chin Hin Lam & Co replied confirming that they have custody of the duly executed 'transfer forms' and enclosed a draft L/G for the plaintiff's perusal and comments. They also asked the plaintiff to

furnish the total consideration to be specified in the 'transfer forms' and the number of housing units to be allocated to the defendant. The plaintiff's solicitors replied on 15 December 1998 stating the property to be transferred is the land and not the approved subdivided lots. As such the defendant's request for the number of housing units was premature. The plaintiff's solicitors also proposed the deletion of cll 1(a) and (b) of the draft L/G.

**[4]** On 17 December 1998 the defendant's solicitors provided the details of the lots selected by the defendant and rejected the plaintiff's proposed deletion of cll 1(a) and (b). Meanwhile, on 19 December 1998 the plaintiff wrote to the defendant enclosing a layout plan identifying the lots selected by the defendant. By a letter dated 6 January 1999 the plaintiff's solicitors replied informing that they were not agreeable to cl 1(a) and (b) and suggested alternative provisions.

**[5]** On 5 March 1999 the plaintiff's solicitors wrote to Chin Hin Lam & Co informing that in order for the plaintiff to obtain the developer's licence it was necessary for a supplementary agreement ('the first supplementary agreement') to be executed. On 11 March 1999 the plaintiff's solicitors sent a draft of the first supplementary agreement to Chin Hin Lam & Co and asked for the duly executed transfer documentation and L/G for execution by the plaintiff's directors. As there was no response the plaintiff's solicitors wrote on 31 March 1999 giving notice that the defendant will be responsible for any loss or damage arising from the delay.

**[6]** On 8 May 1999 Lim Kian Ser & Co who had taken over from Chin Hin Lam & Co informed the plaintiff's solicitors that the duly executed MOT and the title deed to the land have been deposited with them. Lim Kian Ser also asked if the original draft L/G was agreeable. The plaintiff's solicitors replied on 24 May 1999 agreeing to the original draft L/G and enclosing a draft of the first supplementary agreement for the defendant's approval. On 8 June 1999 Lim Kian Ser confirmed that the defendant is agreeable to the draft of the first supplementary agreement. On 17 June 1999 the plaintiff's solicitors provided a fresh list of the defendant's lots and the first supplementary agreement for the defendant's execution and asked the defendant for the title deed and the transfer documentation relating to the land together with the L/G for the plaintiff's execution.

**[7]** On 30 June 1999 Lim Kian Ser returned the duly executed first supplementary agreement to the plaintiff's solicitors. Lim Kian Ser also confirmed that the plaintiff had agreed to the defendant's 'proposal for the transfer of the abovementioned property by way of sale' whereby the purchase price shall be equivalent to the value of the defendant's share under the JVA and that the sale shall be settled by way of allocation of housing units selected

by the defendant. Lim Kian Ser also asked for details of the defendant's entitlements under the JVA in order to prepare a supplementary agreement for the proposed sale ('the second supplementary agreement'). On 14 July 1999 the plaintiff's solicitors provided Lim Kian Ser with the details. Lim Kian Ser replied on 7 August 1999 enclosing a draft second supplementary agreement for the proposed sale. He also informed that the plaintiff and the defendant have agreed that the transfer of the land; and shall be effected by way of sale at the purchase price of RM1,723,271.91. On 1 October 1999 the plaintiff's solicitors returned the draft of the second supplementary agreement containing some amendments, inter alia, proposing in cl 9 that the plaintiff commence and complete the project within three years from the date of transfer of the subdivided lots by the defendant to the plaintiff. Lim Kian Ser replied on 11 October 1999 proposing that (a) the defendant will transfer the land; (b) the plaintiff deposit with them 16 sets of duly executed transfer documentation and forward to them the original individual title deeds upon issuance; and (c) as regards cl 9 the defendant is agreeable to two years from the date the MOT is handed over to the plaintiff. On 19 October 1999 the plaintiff's solicitors replied stating that in principle the plaintiff was agreeable to proposals (a) and (b) above. On proposal (c), however, the plaintiff proposed that a three year period commencing from the date of issuance of subdivided titles. Lim Kian Ser replied on 28 October 1999 reiterating that the defendant is acceptable to a period of two years calculated from the date the MOT is handed over to the plaintiff. In response thereto the plaintiff's solicitors wrote on 17 November 1999 proposing a time frame of three years from the date of issuance of subdivided titles. The plaintiff's proposal was rejected by the defendant on 1 December 1999. On 18 December 1999 the plaintiff's solicitors wrote to Lim Kian Ser appealing for a reconsideration of their proposal. Lim Kian Ser replied on 5 January 2000 rejecting the plaintiff's proposal.

**[8]** The following events that transpired are significant. On 2 March 2000 the plaintiff's solicitors sent a draft of the second supplementary agreement to Lim Kian Ser for the defendant's approval. On 8 March 2000 Lim Kian Ser replied with some comments on the said draft. In respect of para 10, the defendant proposed that the two year period shall commence from the date of the delivery of the original title deed to the land. As there was no response Lim Kian Ser wrote on 27 March 2000 asking for the second supplementary agreement and the L/G for the defendant's execution. On 28 March 2000 the plaintiff's solicitors forwarded another draft of the second supplementary agreement for the defendant's approval. Lim Kian Ser replied on 12 April 2000 with some proposed amendments to the draft of the second supplementary agreement and asked for the agreement and the L/G to be forwarded for the defendant's execution. Lim Kian Ser also suggested the deletion of 'and execution of all instruments and documents for the said surrender and re-alienation by the landowner to the developer' in para 10 'as

the said documents can be executed by the landowner at the same time when the original title deed of the said land is delivered to the developer'. By a reply on 28 April 2000 the plaintiff's solicitors agreed to the said deletion provided that the defendant 'shall execute the said documents at the same time when the original title deed is delivered to the developer'. On 19 May 2000 Lim Kian Ser wrote saying that the defendant has agreed to the plaintiff's proposal and asked for the L/G and the second supplementary agreement for the defendant's execution. On 10 June 2000 Lim Kian Ser issued a reminder for the said documents. The plaintiff's solicitors replied on 19 June 2000 enclosing a MOT, adjudication forms, Form 12A, the second supplementary agreement. They also returned the L/G for the defendant's amendment on the signing page of the landowner's name. Meanwhile on 28 June 2000 Lim Kian Ser wrote asking for the approved layout plan. On 11 July 2000 the plaintiff's solicitors forwarded Form 14A to Lim Kian Ser for the defendant's execution. Lim Kian Ser wrote on 17 July 2000 informing that the defendant has executed the Form 12A, second supplementary agreement and adjudication form but not the MOT. Lim Kian Ser informed that the MOT relates to the land and that the transfer of the subdivided lots may be executed later. On 1 August 2000 Lim Kian Ser forwarded to the plaintiff's solicitors the duly executed L/G, second supplementary agreement, Form 12A and the original title deed to the land.

**[9]** On 15 August 2000 Lim Kian Ser wrote asking for the duly executed and stamped second supplementary agreement and L/G. On 25 August 2000 the plaintiff's solicitors forwarded 101 Forms 14A to the defendant which were duly executed and returned by Lim Kian Ser on 3 October 2000. On 12 October 2000 the plaintiff's solicitors proposed that (a) the defendant transfer the land to the plaintiff in exchange for the duly executed Forms 14A relating to the defendant's subdivided lots, and (b) the two year duration for the completion of the project be calculated from the date of approval of conversion and subdivision. In effect, the plaintiff's solicitors proposed variations to the second supplementary agreement.

**[10]** Lim Kian Ser replied on 1 November 2000 informing that the defendant is only agreeable if the two year period runs from 1 August 2000 and requested for the second supplementary agreement and the L/G. By a reply on 6 November 2000 the plaintiff's solicitors said that the plaintiff is not agreeable and requested for a more amenable date. On 30 November 2000 Lim Kian Ser replied informing of the defendant's insistence that the two year period be calculated from 1 August 2000. Then on 23 December 2000 the plaintiff's solicitors informed of the plaintiff's fresh proposal to revert to the original arrangement and that the 'period of two years for completion of said project under the JVA shall resume now'. The defendant's position was reiterated in Lim Kian Ser's reply of 8 January 2001. By a letter

of 31 January 2001 the plaintiff's solicitors proposed a new variation for the commencement date to take effect from the date of transfer of the said land to the plaintiff. The plaintiff's proposed variation was rejected by the defendant in a letter dated 12 February 2001. On 14 February 2001 the plaintiff's solicitors wrote asking for the defendant's confirmation on whether the JVA should now proceed on the basis of the transfer of the land to the plaintiff before or after the issuance of the individual titles for the subdivided lots. Lim Kian Ser replied on 20 February 2001 leaving the matter to the plaintiff's discretion. Meanwhile, on 19 March 2001 Lim Kian Ser wrote asking for the duly executed and stamped second supplementary agreement and L/G. On 2 April 2001 the plaintiff's solicitors came up with more variations. This time it was proposed that (a) the defendant transfer the land to the plaintiff to enable the plaintiff to apply for the conversion and subdivision and for the project to commence from the date of such approval or alternatively that (b) the defendant transfer the land to the plaintiff after the subdivision of the land and the commencement date of the project to begin from the date of approval for surrender and re-alienation of the land and that the defendant execute a power of attorney in favour of the plaintiff for the subdivided low and medium cost houses and bumi lots. In reply on 20 April 2001 Lim Kian Ser informed of the defendant's insistence on 1 August 2000 as the commencement date and left the choice of options (a) or (b) to the plaintiff's discretion.

**[11]** On 17 July 2001 the plaintiff's solicitors wrote asking if the defendant will agree that 'the date of commencement of the project shall take effect from the date of approval for transfer of consent by the relevant authority from your client to our client pertaining to conversion and subdivision of the said land'. and that the defendant shall transfer the land to the plaintiff to enable the plaintiff to proceed with the surrender and re-alienation. Lim Kian Ser replied on 31 July 2001 reiterating the defendant's stand that the commencement date shall begin on 1 August 2000. Subsequently, on 5 October 2001 Lim Kian Ser wrote asking for the duly executed and stamped second supplementary agreement and L/G.

**[12]** Meanwhile, R Muthu & Co who had taken over from CL Boo & Associates wrote on 20 November 2001 seeking the defendant's stand. As there was no response R Muthu issued a reminder on 4 December 2001. On 6 December 2001 Lim Kian Ser replied stating that they will revert with the defendant's instructions in due course. Meanwhile on 3 January 2002 R Muthu wrote to the plaintiff confirming that they have custody of the original title deed to the land.

**[13]** On 3 January 2002 Lim Kian Ser wrote to R Muthu informing of the defendant's proposal that the 'property in question be sold to your client term

and condition to be agreed upon (sic)'. On 23 January 2002 R Muthu replied rejecting the defendant's proposal. R Muthu also said that they have in custody the L/G which have been executed by the directors of the plaintiff company which will be forwarded to Lim Kian Ser in exchange of the 'escrow transfer'. On 25 February 2002 R Muthu intimated that if there is no reply within ten days the defendant shall be deemed to be in breach of the JVA. Lim Kian Ser replied on 5 March 2002 informing that the defendant's intention to proceed with the project in accordance with the JVA and the second supplementary agreement whereby the two year period shall commence on 1 August 2000. R Muthu replied on 22 March 2002 rejecting the defendant's stand on the commencement date of the two year period. On 29 April 2002 R Muthu demanded that the defendant forward the MOT for the transfer of the land to the plaintiff within ten days. On 13 May 2002 R Muthu wrote to the defendant accepting the defendant's breach of the JVA in failing to forward the MOT and claimed for RM1,486,799.92 in loss and damages. Lim Kian Ser replied on 14 May 2002 stating that the duly executed transfer form have already been forwarded to CL Boo and the question of alleged breach does not arise. R Muthu replied on 16 May 2002 disputing Lim Kian Ser's assertion. R Muthu wrote again on 22 May 2002 stating that the Form 14A forwarded to CL Boo previously related to the subdivided titles to be issued when in fact he was referring to the transfer of the land. On 6 June 2002 Lim Kian Ser replied denying any breach by the defendant. After a lull of six months Lim Kian Ser wrote on 27 November 2002 asking for the return of the original title deed to the land as the JVA had lapsed. A reminder was issued by Lim Kian Ser on 11 April 2003. Finally, on 15 April 2003 R Muthu replied that the title deed is being held back under a lien pending the outcome of litigation.

A B C D E F

## FINDINGS OF THE COURT

**[14]** The events that transpired in this case have been well documented in the numerous correspondence between the plaintiff's solicitors and the defendant's solicitors. Upon an examination of the correspondence and other documents the pertinent facts that emerge are as follows. Subsequent to the execution of the JVA on 7 November 1994 the plaintiff obtained the approval for the conversion and subdivision on 28 July 1997. Initial differences between the parties on the draft L/G were finally resolved on 24 May 1999 when the plaintiff's solicitors finally agreed to the defendant's original draft L/G. At the plaintiff's request the defendant entered into the first supplementary agreement for the purposes of enabling the plaintiff to obtain a developer's licence; the developer's licence was subsequently obtained on 4 August 1999.

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**[15]** On 30 June 1999 the defendant's solicitors wrote to the plaintiff's solicitors informing that the plaintiff have agreed to the defendant's proposal for the transfer of the land to the plaintiff by way of sale. In consideration of the sale, the plaintiff would pay the purchase price which shall be the equivalent of the value of the housing units due to the defendant under the JVA. Accordingly, the purchase price would be settled by way of allocation of the defendant's entitlement of the housing units to the defendant under the JVA. On 7 August 1999 the defendant's solicitors initiated the first draft of the second supplementary agreement and sent it to the plaintiff's solicitors. There was an exchange of letters between the plaintiff's solicitors and the defendant's solicitors between 1 October 1999 to 12 April 2000 relating principally to the time frame for the commencement and completion of the project under the JVA. This issue was finally resolved on 28 April 2000 when the plaintiff agreed to the terms and conditions of the draft of the second supplementary agreement provided that the defendant execute the documentation for the surrender and re-alienation of the land simultaneously with the delivery of the original title deed to the land to the plaintiff. On 19 June 2000 the plaintiff's solicitors finalised the second supplementary agreement and sent it together with some documents to the defendant's solicitors for the defendant's execution. On 17 July 2000 the defendant's solicitors informed the plaintiff's solicitors that the second supplementary agreement, adjudication form and Form 12A have been duly executed by the defendant. Subsequently, on 1 August 2000 the defendant's solicitors forwarded to the plaintiff's solicitors the second supplementary agreement, the L/G and the documents for the surrender and re-alienation of the land all duly executed by the defendant together with the original title deed to the land.

**[16]** About two weeks later the defendant's solicitors wrote to the plaintiff's solicitors asking for the duly executed and stamped second supplementary agreement and L/G. The plaintiff did not respond to the defendant's reminder. Instead by a letter of 25 August 2000 the plaintiff's solicitors forwarded the transfer forms for the subdivided lots where were subsequently executed and returned by the defendant's solicitors on 3 October 2000. It became clear that the plaintiff no longer wished to be bound by the second supplementary agreement when by a letter dated 12 October 2000 they proposed variations to the second supplementary agreement. In particular the plaintiff wanted the time frame for the completion of the project to be two years from the date of approval or confirmation of the conversion and subdivision. The plaintiff's proposed variation contradicts the provision in the second supplementary agreement which provides for the period of commencement and completion within two years calculated from the date of delivery of the original title deed of the land and execution of all instruments and documents for the surrender and re-alienation.

**[17]** The plaintiff's proposed variation was rejected by the defendant on 1 November 2000. But the plaintiff persisted on 6 November 2000 asking for the defendant to cooperate. The plaintiff's request was also rejected by the defendant on 30 November 2000. Undaunted the plaintiff proposed another variation on 23 December 2000. This time they wanted to 'revert to the original arrangement' and proposed that 'the period of two (2) years for completion of the said project under the JVA shall resume from now'. The defendant's reply on 8 January 2001 reiterated that the commencement date shall be 1 August 2000 in accordance with the second supplementary agreement.

**[18]** On 31 January 2001 the plaintiff proposed yet another variation on the commencement date. Now it wanted the commencement date to take effect from the date of transfer of the land to the plaintiff. This proposal was also rejected by the defendant on 12 February 2001. Unable to get a favourable response from the defendant the plaintiff now changed tack. The plaintiff proposed another series of new variations to the defendant on 14 February 2001, 2 April 2001 and 17 July 2001. All these new variations were rejected by the defendant who insisted on 1 August 2000 as the commencement date.

**[19]** By November 2001 R Muthu had taken over from CL Boo. On 3 January 2002 the defendant suggested selling the land to the plaintiff on terms to be agreed upon but this was rejected by the plaintiff on 23 January 2002. The plaintiff gave an ultimatum to the defendant on 25 February 2002. In his reply of 5 March 2002 the defendant informed the plaintiff of the defendant's intention to proceed with the project in accordance with the JVA and the second supplementary agreement. In a letter dated 22 March 2002 the plaintiff rejected the defendant's stand. For the first time the plaintiff asserted that (a) the second supplementary agreement was never executed by the plaintiff and was not enforceable, (b) the only valid supplementary agreement is the first supplementary agreement, and (c) they will rely on the strict interpretation of the JVA and the first supplementary agreement. In the light of the aforesaid circumstances the preliminary issue for determination by this court is whether the second supplementary agreement is valid.

PRELIMINARY ISSUE: IS THE SECOND SUPPLEMENTARY AGREEMENT VALID?

**[20]** Firstly, the evidence shows that the parties have already agreed on the terms and conditions of the second supplementary agreement. The plaintiff's solicitors had settled and drawn up the second supplementary agreement and sent it to the defendant's solicitors for the defendant's execution and return.

The defendant executed the second supplementary agreement and returned it to the plaintiff. Secondly, despite numerous reminders the plaintiff refused to furnish the defendant with a duly executed and stamped copy of the second supplementary agreement. The plaintiff, notwithstanding that they have received the second supplementary agreement refused to furnish the defendant with the same. In fact, the defendant's solicitors sent six reminders on 15 August 2000, 1 November 2000, 30 November 2000, 8 January 2001, 19 March 2001 and 5 October 2001 to the plaintiff's solicitors asking for the second supplementary agreement. No explanation whatsoever was forthcoming from the plaintiff for their aforesaid refusal. On this issue it is pertinent to quote the defendant's solicitors plea in the second and third paragraphs of their letter of 8 January 2001:

> Kindly be informed that all the documents as specified in our letter dated 1st August, 2000 referred to terms and conditions both parties have mutually agreed upon and all the draft agreements have been approved by solicitor both for the developer and the landowner.
>
> In this regard, as we have forwarded the documents to you for your client execution on 1st August, 2000 we would appeal to you and your client kind consideration to execute the requisite agreement and forward a stamp copy thereof to us.

**[21]** Thirdly, after receiving the duly executed second supplementary agreement from the defendant, the plaintiff proposed a number of variations which contradicted the second supplementary agreement. The first of these variations appeared on 12 October 2000, followed by additional variations on 6 November 2000, 23 December 2000, 31 January 2001, 14 February 2001, 2 April 2001 and 17 July 2001. The plaintiff's solicitors have sent the second supplementary agreement to the defendant only after the plaintiff and the defendant have agreed on the terms and conditions therein. Acting on that premise the defendant executed the second supplementary agreement and other documents. It was only after a lapse of more than 19 months that on 22 March 2002 the plaintiff asserts for the first time that the second supplementary agreement was not valid as it was never executed by the plaintiff. In the aforesaid circumstances, can the plaintiff now resile from the second supplementary agreement? The court takes the view that the plaintiff cannot draw back from the second supplementary agreement. The second supplementary agreement is clearly a concluded agreement (see *Ho Kam Phaw v Fan Sin Nin* [2000] 2 MLJ 529; [2000] 3 CLJ 1 (FC)). For the foregoing reasons the court finds that the second supplementary agreement is a valid and binding agreement.

**[22]** Based upon this finding the court proceeds to determine the four issues to be tried which are as follows

(1) Whether the plaintiff has breached its obligations under the JVA and second supplementary agreement?

(2) Whether the defendant has breached its obligations under the JVA and second supplementary agreement? A

(3) Whether the plaintiff is entitled to the damages as pleaded?

(4) Whether the defendant is entitled to the damages and other orders as pleaded? B

**[23]** In this regard the pertinent clauses of the JVA and second supplementary agreement are reproduced below:

JVA: C

3. The Developer hereby confirms and undertakes with the Landowner that the Developer shall obtain the approval of the proper authorities concerned for the conversion and subdivision of the said land within Three (3) years from the date hereof. D

4. The Landowner hereby agrees and undertakes to:

(b) sign and execute a deed of Power of Attorney in favour of the Developer to enable the Developer to proceed to develop the said land into a housing estate by conversion and subdivision. E

(c) execute in escrow a memorandum of transfer of the said land in favour of the Developer and deposit the title deed of the said land with the Solicitors Messrs Chin Hin Lam & Co. of No. 14, 2nd Floor, Jalan Mersing, 86000 Kluang, Johore who shall hold all the documents as a stakeholder. F

(d) hereby irrevocably authorise the said Solicitors Messrs Chin Hin Lam & Co, upon the granting of conversion and subdivision approval by the appropriate authorities to transfer the said land to the Developer who will be responsible for the cost and disbursement of the transfer and upon execution of Letter of Guarantee by all the Directors of the Developer undertaking and guaranteeing the transfer/allocation of the Landowner share to the Landowner as specified in this Agreement hereof. G

7. The Landowner shall be entitled to: H

(i) 22% of all types of building (other than low cost) and to be erected on the said land including bumi lot.

(ii) 20% of the proceeds of sale of low cost building erected on the said land. I

(iii) In the event that the Developer is required by the appropriate authorities to reserve forty per centum (40%) or such other per centage (sic) of the houses to be built for Bumiputra, then in such

event the Landowner shall bear their share of the said forty per centum (40%) or such other per centage (sic) proportionately in accordance with their per centage (sic) of the sub-divided lots.

11. The developer is entitled to charge for purposes of obtaining bridging finance for the housing scheme on the said land all the lots on the said land other than those lots that are chosen by the Landowner in accordance with Clause 7 PROVIDED ALWAYS that this entitlement to charge shall only be available to the developer on the issue of the qualified title to the subdivided lots on the said land.

18. It is further understood and agreed between the Landowner and the Developer the following:

(a) that the Developer shall commence, complete the construction of all types of building as approved to be erected and infractural facilities/amenities to be built and erected in the said land within 3 years calculated from the date of approval for conversion and subdivision of the said land obtained from the relevant Government authorities.

(b) that the developer shall upon obtaining the issuance of the individual subdivided/separate title from the relevant authorities deposit with Messrs Chin Hin Lam & Co., of the Landowner's portion of the individual/subdivided/separate title which they are entitled pursuant to clause 7 of this Agreement together with the duly executed Memorandum of Transfer pending transfer to the names of the Landowners and/or nominee/nominees.

(c) that the Landowner shall refund the deposit sum of RM45,000-00 (Ringgit Malaysia Forty Five Thousand) only without interest to the Development of the said land into housing and/or industrial estate.

19. Time specified herein shall be the essence of this Agreement.

Second Supplementary Agreement:

1. In consideration of matters aforesaid, the Landowner shall deliver as soon as may be the original document of title to the Said land together with the requisite documents including current quit rent receipt, and instruments and documents for surrender and re-alienation of the Said land to the Developer to proceed with the Joint Venture.

9. This Agreement shall be read together with the said Joint Venture Agreement and in the event that the terms and conditions of this Agreement are inconsistence or in conflict with or different from the

terms and conditions contained in the said Joint Venture Agreement, the terms and conditions contained hereto will prevail.

10. It is further understood and agreed between the Landowner and the Developer that *Clause 18(a)* to the Joint Venture Agreement be hereby amended to read as follows:

> that the Developer shall commence, build and complete the construction of all types of building as approved to be erected and infrastructural facilities/amenities to be built and erected on the Said Land *within two (2) years calculated from the date of delivery of the original title deed of the Said Land and execution of all instruments and documents for the surrender and re-alienation by the Landowner to the Developer*.

11. This Agreement shall be supplemental to the Joint Venture Agreement. (Emphasis added.)

WHETHER THE PLAINTIFF AND OR THE DEFENDANT BREACHED ANY OBLIGATIONS UNDER THE JVA AND THE SECOND SUPPLEMENTARY AGREEMENT?

**[24]** The second supplementary agreement is not an agreement which is distinct and separate from the JVA. It is an agreement which is supplemental to the JVA and should be read together with the JVA. Accordingly, to the extent that any terms and conditions in the JVA are inconsistent with the second supplementary agreement, the terms and conditions of the second supplementary agreement shall prevail (see cl 9, second supplementary agreement).

**[25]** In order to determine whether the plaintiff or the defendant have committed any breach of the JVA and second supplementary agreement, it is pertinent to consider their respective averments. For the plaintiff it is pleaded that the defendant failed, refused and or neglected to forward the duly executed MOT of the land despite the plaintiff's directors executing the L/G in accordance with cl 4(d) of the JVA. For the defendant it is pleaded that: (a) the plaintiff failed to hand over the L/G to the defendant in exchange for the executed MOT and title deed to the land; (b) the plaintiff failed and neglected to commence and complete the project within three years from 28 July 1997 and to complete the same on or by 27 July 2000; and (c) the plaintiff wrongfully and without just cause lodged a caveat on 24 February 2000 on the land.

**[26]** Turning first to the plaintiff's allegation—that the defendant refused to forward the duly executed MOT of the land despite the L/G being executed by the plaintiff's directors in accordance with cl 4(d) of the JVA.

Under this clause the defendant agreed to transfer the land to the plaintiff upon the approval for the conversion and subdivision being obtained. However, as this issue is also tied to the execution of the L/G by the plaintiff's directors, the defendant's allegation that the plaintiff failed to hand over the L/G to the defendant in exchange for the executed MOT and title deed to the land will be considered jointly. The approval for the conversion and subdivision was obtained on 28 July 1997 and the defendant informed of it on 2 March 1998. By 1 August 2000 the defendant's solicitors returned to the plaintiff's solicitors the duly executed second supplementary agreement together with the duly executed L/G and the title deed to the land but excluding the MOT. The defendant's solicitors were holding back the MOT for the land until after they received the duly stamped and executed second supplementary agreement and the L/G. Despite issuing six reminders to the plaintiff's solicitors for the second supplementary agreement and L/G, the plaintiff's solicitors refused to comply with the defendant's solicitor's request. The plaintiff's assertion that it executed the L/G is not supported by the evidence. The L/G was not produced in court. The L/G is an important piece of evidence. It could and should have been produced by the plaintiff. The plaintiff did not give any cogent reasons for failing to produce it. In the premises the plaintiff's assertion that it had already executed the L/G is only a bare assertion. There is no evidence to show that the plaintiff's directors have executed the L/G in accordance with cl 4(d) of the JVA. On the contrary, the evidence shows that the defendant was at all times ready, able and wiling to hand over the duly executed MOT to the plaintiff; instead it was the plaintiff who refused to hand over the second supplementary agreement and the L/G in exchange for the MOT and title deed. The court finds that on a balance of probabilities the plaintiff's allegation is unsubstantiated and without basis. In this respect the plaintiff's refusal to hand over the L/G to the defendant is in breach of the JVA and the second supplementary agreement.

**[27]** Reverting to the defendant's allegation concerning the commencement and completion of the project. Under the second supplementary agreement the period of two years is calculated from the date of the delivery of the title deed and execution of the documents for the surrender and re-alienation of the land which fell on 1 August 2000; accordingly the date for completion fell on 31 July 2002. It is noted that after the second supplementary agreement was concluded the plaintiff had two years to commence and complete the project. As early as 6 October 1994 the plaintiff declared that they were planning to start the project. There was nothing to prevent the plaintiff from commencing and completing the project. The plaintiff did not give any reason for not commencing works on the land. Further, even though the plaintiff had already obtained the developer's licence on 2 August 1999 the plaintiff did not commence any work on the site; instead the plaintiff procrastinated and procrastinated. By

31 July 2002 there was still nothing built on the land. When the JVA had lapsed there was evidently no work done by the plaintiff on the land. In the circumstances the court finds that the plaintiff have failed to commence and complete the project in accordance with the JVA and the second supplementary agreement. The plaintiff' aforesaid failure is a breach of the JVA and the second supplementary agreement.

**[28]** For the foregoing reasons the plaintiff's claim is dismissed with costs. Learned counsel for the defence informed that the defendant is not claiming general damages. Accordingly, the defendant's counterclaim is allowed in prayers (b), (c), (d) and (e).

*Plaintiff's claim dismisssed. Defendant's counterclaim allowed in part.*

Reported by Ashgar Ali Ali Mohamed